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SUPREME COURT, U.S.

No. 82 5853

IN THE SUPREME COURT OF THE UNITED STATES  
October Term, 1982

EDWARD B. FITZGERALD,  
Petitioner,

v.

COMMONWEALTH OF VIRGINIA,  
Respondent.

\_\_\_\_\_  
PETITION FOR WRIT OF CERTIORARI  
TO THE SUPREME COURT OF VIRGINIA  
\_\_\_\_\_

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QUESTIONS PRESENTED

I. whether the trial court's instructions at sentencing were tantamount to a directed verdict of death after the jury returned with a finding of the existence of aggravating circumstances suggesting non-unanimity?

II. Whether petitioner was denied due process where the only evidence of penetration to sustain capital murder based on rape was his uncorroborated "admission" to a jail inmate called as a surprise witness?

III. Whether the trial court had an affirmative duty to inquire further of defense counsel when the court had actual knowledge of a potential conflict of interest on the part of that counsel?

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PETITION FOR A WRIT OF CERTIORARI  
TO THE SUPREME COURT OF VIRGINIA

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Petitioner, Edward B. Fitzgerald, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Virginia entered in this case.

CITATION TO OPINION BELOW

The opinion of the Supreme Court of Virginia is reported in Fitzgerald v. Commonwealth of Virginia, \_\_\_ Va. \_\_\_, 292 S.E.2d 796 (1982), and is appended hereto at 1a. The order of the Supreme Court of Virginia denying Mr. Fitzgerald's petition for rehearing is unreported.

JURISDICTION

The judgment of the Supreme Court of Virginia was entered on June 18, 1982. A timely petition for rehearing was denied on September 9, 1982. On November 1, 1982, Chief Justice Warren E. Burger, Circuit Justice for the Fourth Circuit, issued an order granting petitioner to and including

December 8, 1982, to file this petition. Jurisdiction of this court is invoked pursuant to 28 U.S.C. §1257(3), petitioner having asserted below and intending to here assert deprivation of rights secured by the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY  
PROVISIONS INVOLVED

1. This case involves the Eighth Amendment to the Constitution of the United States, which provides in relevant part:

... nor cruel and unusual punishments inflicted;

the Fourteenth Amendment to the Constitution of the United States, which provides in relevant part:

No state shall ... deprive any person of life, liberty or property, without due process of law;

and the Sixth Amendment to the Constitution of the United States, which provides in relevant part:

In all criminal prosecutions, the accused shall enjoy the right ... to have the assistance of counsel for his defence.

2. This case also involves Va. Code §18.2-31 (1950), as amended, which provides in relevant part:

The following offenses shall constitute capital murder, punishable as a Class 1 felony:

\* \* \*

(d) The willful, deliberate and premeditated killing of any person in the commission of robbery while armed with a deadly weapon;

(e) The willful, deliberate and premeditated killing of a person during the commission of, or subsequent to, rape;

Va. Code §19.2-264.2, which provides:

In assessing the penalty of any person convicted of an offense for which the death penalty may be imposed, a sentence of death shall not be imposed unless the court or jury shall (1) after consideration of the past criminal record of convictions of the defendant, find that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society or that his conduct in committing the offense for which he stands charged was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim; and (2) recommend that the penalty of death be imposed[ ];

and Va. Code §17.110.1, which provides in relevant part:

C. In addition to consideration of any errors in the trial enumerated by appeal, the court shall consider and determine:

1. Whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor.

#### STATEMENT OF THE CASE

Petitioner seeks a writ of certiorari from this Court to the Supreme Court of Virginia to review a decision of that court upholding his convictions and sentence of death.

Petitioner is convicted of capital murder (two counts), armed robbery, rape, abduction with intent to defile, and burglary, all arising from a series of incidents occurring on November 13 and 14, 1980. The jury recommended sentences of death for capital murder based upon the "vile, horrible or inhuman nature" of the offense, Va. Code §19.2-264.2, and life sentences for each of the remaining convictions.

Five days prior to trial, petitioner was informed, for the first time, by the trial court that the wife of his princí-

ple defense attorney, Fred S. Hunt, worked for the very Commonwealth Attorney's office that was prosecuting the case. App. at 28a. The trial court asked petitioner if he was satisfied with his attorney but the court failed to inquire as to whether counsel was able to effectively represent petitioner. App. at 29a-30a.

The evidence presented at trial by the Commonwealth fundamentally was based on the testimony of petitioner's co-defendant, Daniel Johnson, who was arrested on November 14, 1980, prior to petitioner's arrest. As a result of plea bargaining, petitioner's co-defendant never stood trial for the capital offense for which he was indicted, and instead was sentenced to forty years in prison. Petitioner has consistently maintained his innocence.

At trial the Commonwealth presented evidence, through Johnson, that petitioner and Johnson had, on the evening of November 13, been at petitioner's house together with several other people, when petitioner received a phone call from a friend indicating that the friend expected some trouble.<sup>1/</sup> Tr. 344-346. Petitioner produced a machete, which Johnson strapped on, and they proceeded to the house of petitioner's friend. Tr. 346. Finding no trouble at that house, petitioner and Johnson decided to go to the temporary residence of the murder and rape victim, Patricia Cubbage, to look for drugs. Tr. 353. They did not expect her, or anyone else, to be at home.

After breaking into the Cubbage house, Johnson stayed downstairs while petitioner went upstairs. Tr. 359. Johnson heard a woman's voice and went upstairs into Cubbage's

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<sup>1/</sup> The description of the events of November 13 and 14 presented in this Statement of the Case, are based solely on Johnson's testimony, unless otherwise noted.

bedroom. Tr. 355-356. He found Cubbage on the floor with petitioner standing over her. Tr. 356. He and petitioner helped Cubbage onto her bed. Tr. 357. Petitioner proceeded to unzip and drop his pants and move onto the bed. Tr. 359. At this point, Johnson turned around towards the wall and saw nothing further until petitioner was pulling his pants back up. Tr. 359. (A single pubic hair, consistent with petitioner's, was later found on the bedsheet. Tr. 597.) At this point, petitioner decided to abduct Cubbage, in order to "finish the job he had come there to do." Tr. 363. Petitioner, Johnson and Cubbage proceeded in Johnson's car to a secluded area where, Johnson states, she was slain by petitioner by multiple stabbings. The body was found on November 14 and both petitioner and Johnson were arrested later that day.

The Commonwealth supplemented Johnson's testimony at trial with that of Wilbur Caviness, who had been a inmate in the jail where petitioner had been kept prior to trial, and whose charges were then pending. Tr. 423, 428. Caviness, who was used by the Commonwealth as a "surprise" witness, testified that Fitzgerald had told him that he had killed and mutilated Cubbage because "[I] screwed the woman and the pussy was so good to [me that I] cut it out and carried it home to eat." Tr. 423.

After petitioner was convicted of capital murder and the other offenses, a separate sentencing hearing was held. At that hearing the Commonwealth produced evidence that petitioner had several years earlier been convicted of the unlawful wounding of his wife, tr. 879, in attempt to show that petitioner was a continuing serious threat to society. Va. Code §19.2-264.2. The jury was instructed orally and in writing that it could impose the death penalty if it found either that he posed a future threat to society or if his conduct was "outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of

mind, or an aggravated battery to the victim." Id.

The jury deliberated for over 8 hours and returned with a verdict of death based upon the two aggravating circumstances they found in the alternative. App. at 22a. The trial judge ordered the jury to renew deliberations and to "make an election as to which one you did find he did." App. at 24a. The jury returned with a verdict finding the existence of the "vileness" aggravating circumstance. App. at 26a. On appeal the Virginia Supreme Court affirmed the convictions and death sentence. Fitzgerald v. Commonwealth, \_\_\_ Va. \_\_\_, 292 S.E.2d 798 (1982).

HOW THE FEDERAL QUESTIONS  
WERE RAISED AND DECIDED BELOW

Petitioner alleged in his brief on appeal that his trial counsel was ineffective due to the conflict of interest posed by the employment relationship of counsel's wife with petitioner's prosecutor. The Virginia Supreme Court rejected petitioner's contention that his Sixth Amendment rights were violated by this conflict of interest holding that there was no evidence of a potential conflict of interest which would have required any inquiry by the trial court. App. at 14a-15a.

The question presented concerning the instructions to petitioner's jury at sentencing which amounted to a directed verdict of death was not expressly raised at petitioner's trial or in his brief on direct appeal to the Supreme Court of Virginia. Nevertheless, it was sufficiently raised and considered in the Supreme Court of Virginia to sustain this Court's jurisdiction. Pursuant to Va. Code §17.110.1(C), the Virginia Supreme Court is required to independently ascertain whether the sentence of death "was imposed under the influence of any ... arbitrary factor." The disjunctive verdict which raised a question of lack of unanimity and

the prejudicial instructions given by the trial judge to correct the verdict resulted in sentencing fraught with substantial arbitrariness. Thus, the Virginia Supreme Court was charged by statute to consider this claim and implicitly did so. App. at 15a-16a.

Petitioner's trial counsel, at the close of the Commonwealth's case and after the verdicts were returned, moved to strike the evidence of capital murder predicated upon the rape as insufficient as a matter of law. On direct appeal, petitioner designated that claim as error 12(d) in his assignments of error. App. at 19a. The Virginia Supreme Court treated the error as waived because it was not pursued on brief or in oral argument. App. at 7a. Yet, in previous capital cases the Supreme Court of Virginia has expressly examined assignments of error neither briefed nor argued rather than holding them to be waived. See, e.g. Turner v. Commonwealth, 221 Va. 513, 273 S.E.2d 36 (1980), cert. denied, 451 U.S. 1011 (1981). Appellate counsel's reliance upon such prior pronouncements by the Virginia Supreme Court should not prejudice petitioner's right to review by this Court in light of the motions to strike in the trial court and the express assignment of error.

#### REASONS FOR GRANTING THE WRIT

- I. THIS COURT SHOULD GRANT CERTIORARI TO REVIEW THE TRIAL COURT'S INSTRUCTIONS AT SENTENCING WHICH WERE TANTAMOUNT TO A DIRECTED VERDICT OF DEATH AFTER THE JURY RETURNED WITH A FINDING OF THE EXISTENCE OF AGGRAVATING CIRCUMSTANCES SUGGESTING NON-UNANIMITY.

After deliberating for almost 8 hours on the question of punishment, petitioner's jury returned a verdict of death based on special findings stated in the alternative.

The trial court refused to accept the verdict as rendered and required the jury to elect between the two aggravating circumstances. The court did not then instruct the jury that their finding must be unanimous nor did it instruct that they need not find either of the two circumstances. In effect, the trial court forced the jury to return a death sentence after the jury indicated that their special finding may not have been unanimous.

Under Section 19.2-264.4 of the Code of Virginia, 1950, as amended, the jury is provided special verdict forms. The form authorizes imposition of the death penalty where the jury, having found a defendant guilty of a capital offense, makes a specific finding of one of two aggravating factors. Both aggravating factors were argued by the Commonwealth to apply to petitioner.

The first aggravating factor concerns the probability that petitioner "would commit criminal acts of violence that would constitute a continuing serious threat to society." Section 19.2-264.2. The second aggravating circumstance required the jury to find that petitioner's "conduct in committing the offense is outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim." *Id.* The jury verdict form in petitioner's case was drafted to authorize the jury to find that petitioner constituted a serious threat to society "and/or" that his conduct satisfied the vileness standard. App. at 28a.

When petitioner's sentencing jury first returned to the court with a verdict, the trial judge refused to accept it because the foreman did not strike out the "and/or" in the verdict form. App. at 22a. The jury foreman responded, "I would strike out the and. It would be or." App. at 22a.

The trial judge, however, ordered that the jury reconsider its verdict, stating, "you have a choice of whether you found one way or the other way or both." App. at 22a-23a.

The jury again retired and returned with a verdict striking the word "and" in the form, thus again making a finding of aggravating circumstances in the alternative. The trial judge still refused to accept the verdict and gave the following instruction:

As I instructed you, before you can impose the death penalty, it is necessary for you to make one or two findings. You don't have to find both; one or the other, or you can find both. The way the verdict is written with the or in it, you don't say which one. You would have to strike out the paragraph that was involved. So what I am saying to you, you have to make an election as to which one you did find that he did.

App. at 24a.

Subsequent to this instruction, directing the jury to elect between the two circumstances, the jury retired yet again and finally returned with a verdict finding the existence of the vileness aggravating circumstance. Thus, petitioner was sentenced to death.

There was a two-fold problem with these instructions and the resulting jury findings. First, a verdict stated in the alternative does not clearly and unequivocally state the findings upon which the death penalty was based. In their initial two attempts, the jury found that petitioner was a continuing serious threat to society or that the conduct he engaged in was sufficiently vile. The verdict does not say which is found.

Nor do those attempted verdicts on their face assure that the jurors were unanimous in finding either of the two circumstances. Rather, it is equally possible, for example, that six of the jurors found for "vileness" and six for "future dangerousness." Where on the face of the verdict

itself it is impossible to determine whether there was unanimity on any special finding, the verdict should be set aside.

Unanimity in jury verdicts is required where the Sixth and Seventh Amendments apply. In criminal cases, the requirement of unanimity extends to all issues -- character or degree of crime, guilt and punishment -- which are left to the jury. A verdict embodies in a single finding the conclusions by the jury upon all questions submitted to it.

Andres v. United States, 333  
U.S. 741, 748 (1948).

Further, under Virginia law petitioner was entitled to a unanimous verdict. Va. Const. art. I, §8.

While the issue concerning non-unanimous findings on aggravating circumstances has not been ruled upon by this Court, in Andres this Court interpreted the then existing federal death penalty statute which required the imposition of death in all murder cases unless the jury specifically found that capital punishment was not warranted. This Court held that before the ultimate punishment could be imposed, the jury must conclude unanimously that the defendant was guilty and separately must conclude unanimously that death should be imposed.

Indeed, particularly in capital cases, verdicts should be certain and unambiguous. Where the instructions on permissible sentences are in error, it is incumbent upon a reviewing court to resolve doubts in favor of the accused. Andres, 333 U.S. at 752. In a related context, this Court has held that if the jury has been instructed to consider several grounds for a conviction, one of which proves to be unconstitutional, and the reviewing court is thereafter unable to determine from the record whether the jury relied on the unconstitutional ground, the verdict must be set

aside. Bachellar v. Maryland, 397 U.S. 564 (1970); Stromberg v. California, 283 U.S. 359 (1931). This Court recognized a closely analogous problem in Zant v. Stephens, \_\_\_ U.S. \_\_\_, 102 S.Ct. 1856 (1982), where this Court was asked to decide whether a death sentence which is imposed on the basis of a plurality of aggravating circumstances should be set aside where one of those aggravating circumstances later is proven to be unconstitutional.

In petitioner's case it simply cannot be determined with the degree of certainty required in capital cases whether the disjunctive verdict first returned by the sentencing jury reflected a unanimous finding on either of the two aggravating circumstances. At most, such a verdict allows only one of two inferences: (1) that the jury unanimously concluded one or the other circumstance existed, or (2) some jurors found one circumstance and the remaining jurors found the other.

The error reflected in the disjunctive verdict was exacerbated by the instructions of the trial judge who refused to accept the verdict. The trial judge explicitly directed the jury to elect between the two circumstances. The jury was instructed to find one or the other, or both. At no time did the trial judge reinstruct the jury that their verdict concerning punishment need be unanimous. In effect, the trial judge directed at that time that a verdict of death be returned, even though there was sufficient reason to believe that the jury had failed to conclude unanimously that either of the circumstances existed.

Directed verdicts in criminal cases, of course, are totally unacceptable. United Brotherhood of Carpenters and Joiners of America v. United States, 330 U.S. 395, 408 (1947). Such a directive, whether express or implied, im-

properly invades the province of the jury. The coercive effect of the challenged reinstruction is apparent from the face of the record.

The death penalty may not be imposed under sentencing procedures that create an appreciable risk that the penalty will be inflicted in an arbitrary and capricious manner. Furman v. Georgia, 408 U.S. 238 (1972). There is no assurance that the jury in petitioner's case freely and fairly arrived at a unanimous verdict on the question of which of the two aggravating circumstances existed to satisfy the imposition of death. Because the penalty of death is qualitatively different from a sentence of imprisonment the need for reliability in the determination that death is the appropriate punishment is thereby heightened. Woodson v. North Carolina, 428 U.S. 280 (1976). The disjunctive verdict and the subsequent coercive instruction have stripped the death sentence imposed on petitioner of that reliability. Therefore, this Court should review this case as such review would have significant impact on the administration of the death penalty in this country.

II. THIS COURT SHOULD GRANT CERTIORARI TO REVIEW WHETHER PETITIONER WAS DENIED DUE PROCESS WHERE THE ONLY EVIDENCE OF PENETRATION TO SUSTAIN CAPITAL MURDER BASED ON RAPE WAS HIS UNCORROBORATED "ADMISSION" TO A JAIL INMATE CALLED AS A SURPRISE WITNESS.

- A. The evidence of capital murder based upon rape was so insufficient as a matter of law as to violate due process.

The Fourteenth Amendment protects a defendant in a criminal case against conviction "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re Winship, 397 U.S. 358, 364 (1970). This principle was explicitly extended to state court proceedings in Jackson v. Virginia, 443 U.S. 307 (1979), in which this Court overruled the

previous "no evidence" standard under which a federal appellate court would review state court criminal convictions in favor of a standard encompassing the Winship requirements:

[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

Jackson, 443 U.S. at 319 (emphasis in original).

The state trial court in petitioner's case ignored its mandate under Jackson by deciding, over the motion of defense counsel, tr. 663, that the rape case be submitted to the jury despite the fact that the evidence could not allow a rational trier of fact, under the law, to find the required element of penetration.

In Virginia, rape is statutorily defined, in relevant part, as:

. . . sexual intercourse with a female [which is] accomplished (1) against her will, by force, threat or intimidation. . . 2/

Va. Code §18.2-61. To prove rape "the prosecution must prove that there has been an actual penetration to some extent of the male sexual organ into the female sexual organ." McCall v. Commonwealth, 192 Va. 422, 65 S.E.2d 540, 542 (1951). "It is not sufficient that facts and circumstances proven be consistent with petitioner's guilt. To sustain a conviction they must be inconsistent with every reasonable hypothesis of his innocence." McCall, 65 S.E.2d at 542, quoting Spratley v. Commonwealth, 154 Va. 854, 152 S.E. 362 (1930).

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2/ The Court in Jackson, 443 U.S. at 324, n. 16, indicated that the constitutional review "must be applied with explicit reference to the substantive elements of the criminal offense as defined by state law."

In the light most favorable to the prosecution, the following evidence was produced in support of the rape charge which served as the predicate for petitioner's capital murder conviction. First, accomplice Johnson testified that he was in the bedroom with petitioner and the victim, Ms. Cubbage, when the alleged rape occurred and that he saw petitioner, his pants pulled down around his thighs, go onto the bed with Cubbage, at which time he heard Cubbage breathing hard and the bed squeaking. Tr. 359-360. Second, a single pubic hair, found by a prosecution witness to be "consistent" with Mr. Fitzgerald's, was found on Ms. Cubbage's bed sheet. Tr. 591, 597. Finally, Caviness, who was incarcerated in the same jail as petitioner as he awaiting trial, testified that petitioner said: "[I] screwed the woman and the pussy was so good to [me that I] cut it out and carried it home to have it to eat," in response to the inmate's inquiry as to why he "kill[ed] this woman and cut her up." <sup>3/</sup> Tr. 423.

The trial court apparently ignored the uncontradicted fact that there was no evidence of seminal fluid in the victim's vagina (or anywhere else) nor of petitioner's pubic hairs in her pubic area. Tr. 615. However, the court in McCall, 65 S.E. at 542, instructed:

The absence of semen in the [victim's] genital organs or of stains therefrom on her clothing, while not conclusive of the fact, is a strong circumstance indicating that there was no attempted sexual intercourse.

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<sup>3/</sup> The insufficiency, as a matter of law, of this "admission" to prove penetration is discussed in detail, infra. Additionally, the due process violation connected with the prosecution's use of Caviness as a surprise witness is also detailed, infra.

Accord, Coles v. Peyton, 389 F.2d 224, 227, n.5 (4th Cir. 1968) (applying Virginia law). In view of the fact that the only tangible evidence concerning penetration showed that no penetration occurred, and the absence of other evidence, apart from the "admission," that could rationally show penetration beyond a reasonable doubt, the trial court erred in not granting a judgment of acquittal on the rape and capital murder charges.

The prosecution in petitioner's case attempted to supply the element of penetration through the only "evidence" it could muster; the "admission" purportedly made by petitioner to his fellow inmate. <sup>4/</sup> In Smith v. United States, 348 U.S. 147 (1954), this Court made it clear that the prosecution may not do so:

The general rule that an accused may not be convicted on his own uncorroborated confession has previously been recognized by this Court [citations omitted], and has been consistently applied in the lower federal courts and in the overwhelming majority of state courts [citations omitted]. Its purpose is to prevent "errors in convictions based upon untrue confessions alone." [citation omitted].

This corroboration requirement applies with equal force to admissions. Opper v. United States, 248 U.S. 84 (1963).

In Wong Sun v. United States, 371 U.S. 471, 489, n. 15 (1963), this Court elucidated the corroboration requirement with respect to crimes involving physical damage to person or property:

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<sup>4/</sup> Even assuming, arguendo, that the words constituting this "admission" were spoken by petitioner, it is anything but clear that they were intended to be a truthful confession to the alleged rape or any element of the alleged rape. The words allegedly spoken by petitioner seem more likely to have been petitioner's misguided attempt at humor, or may have been intended to show anger with Caviness' question. Moreover, courts are mindful that the weight to be accorded a confession is necessarily dependent upon its quality and thus view factors such as its detailed nature as highly significant in determining its probative value. See e.g., United States v. Gresham, 585 F.2d 103, 106 (5th Cir. 1978). By any reasoned standards, petitioner's "admission" must be given little weight.

Where the crime involves physical damage to person or property, the prosecution must generally show that the injury for which the accused confesses responsibility did in fact occur, and that some person was criminally culpable. A notable example is the principle that an admission of homicide must be corroborated by tangible evidence of death of the supposed victim. See 7 Wigmore, Evidence (3d ed. 1940), §2072, n.5.

Virginia law also requires that the "corpus delicti" may not be proved by extra-judicial confession alone." Phillips v. Commonwealth, 202 Va. 207, 116 S.E.2d 282, 285 (1960). In applying that principle in connection with a sodomy conviction, the court in Phillips refused to allow the conviction to stand even in view of a lengthy written confession by Phillips and the fact that the co-defendant was in possession of Phillips' automobile, corroborating part of the confession. The court adopted the rule that "the coincidence of circumstances tending to indicate guilt however strong and numerous they may be, avails nothing unless the corpus delicti, the fact that the crime has been actually perpetrated, be first established." Id. 5/

Under the principles set forth by this Court and the Virginia Supreme Court it is clear that tangible evidence of the alleged penetration must be shown in order to sustain a rape conviction. By failing to require corroboration of the "admission," and by ignoring the scientific evidence strongly tending to demonstrate the absence of penetration, the trial court unconstitutionally denied petitioner due process of law. His capital murder conviction predicated upon rape, then, should be reviewed by this court and reversed.

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5/ This rule has been applied with particular stringency with regard to sexual offenses. State v. Kraus, 230 S.E.2d 800 (N.C. App. 1977). See also 40 A.L.R. 460 ("Necessity and character of corroboration of confession of sexual offenses.")

- B. The prosecution's use of a surprise witness necessary to sustain the capital murder-rape conviction and the sentence of death runs afoul of the due process clause.

The insufficiency of the evidence of rape in this case is compounded by the Commonwealth's constitutionally impermissible use of a surprise witness -- the jailhouse snitch -- by which the Commonwealth effectively and calculatedly subjected Mr. Fitzgerald to the death penalty in contravention of rights guaranteed by the Fifth, Eighth and Fourteenth Amendments. Undoubtedly, the use of the inmate was contemplated by the Commonwealth long before trial in an attempt to buttress the fundamental weakness of their evidence of rape. However, rather than divulge their scheme to use his testimony, so as to allow defense counsel to conduct the necessary investigation to challenge and discredit this highly suspect testimony, the prosecution elected to unveil their "bombshell" where its impact would be most devastating: in front of the jury at trial. This deliberate use of a surprise witness effectively shocked defense counsel and resulted in the inmate being only tentatively and inconsequentially cross-examined <sup>6/</sup>. As a result, this unimpeached, inflammatory testimony had a two fold destructive effect: (1) it supplied to the jury a basis upon which they could convict Mr. Fitzgerald of rape, and thus supply the necessary predicate for the capital murder charge, <sup>7/</sup> and (2) the malignant nature of the alleged statement made by Mr. Fitzgerald to the inmate established to the jury that he was a man not fit to live.

In Gardner v. Florida, 430 U.S. 349 (1977), this Court reversed a death sentence because the judge who imposed it

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<sup>6/</sup> The surprise created by this witness is well documented in the record. See Tr. at 660.

<sup>7/</sup> Of course, as established supra, from any perspective this testimony could not sufficiently establish rape in this case.

acted partly on the basis of information that was not disclosed to the defendant or his counsel. This Court recognized that in an ordinary case such procedure might be acceptable, but specifically distinguished potential "death penalty" cases. "[F]ive members of the Court have now expressly recognized that death is a different kind of punishment from any other which may be imposed in this country." Id. at 357. Accordingly, the Gardner Court, balancing the benefits of withholding the information against the costs, found that the advantages to the state -- obtaining information more easily, avoiding delay and preventing harm to the defendant's rehabilitation (if not executed) -- were overwhelmed by the damage to justice's overriding "interest in reliability." Id. at 358-60. See also Lockett v. Ohio, 438 U.S. 586, 604 (1978) (the difference between death and all other criminal sanctions calls for a greater degree of reliability when the death sentence is imposed).

Recognizing the fundamental error which this Court identified in Gardner -- defense counsel's inability to challenge or answer the evidence on which the death sentence is based -- the Fifth Circuit in Smith v. Estelle, 602 F.2d 694 (5th Cir. 1979) aff'd 451 U.S. 454 (1981), held that the defendant's right to due process was denied where the state utilized a surprise witness in the sentencing phase of a death penalty case. <sup>8/</sup>

In Smith the Fifth Circuit adopted the "balancing interests" analysis articulated by this Court in Gardner. The Fifth Circuit first focused on the adverse consequences of the use of a surprise witness:

Surprise can be as effective as secrecy in preventing effective cross-examination, in denying

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<sup>8/</sup> This Court affirmed the Fifth Circuit's opinion in Smith, but did not reach the issue presented here. Estelle v. Smith, 451 U.S. at 473, n.17. (All further references to Smith in this petition are to the Fifth Circuit's opinion.)

the "opportunity for [defense] counsel to challenge the accuracy or materiality of evidence, Gardner v. Florida, 430 U.S. at 357, and in foreclosing 'that debate between adversaries [which] is often essential to the truth-seeking function of trials,' id. at 360.

Smith v. Estelle, 602 F.2d at 699.

In Smith the surprise witness was a psychiatrist who gave devastating testimony with regard to defendant's future dangerousness which, due to the surprise, could not be effectively responded to or impeached. Id. In the case sub judice, the surprise testimony was even more harmful because it not only provided the underpinnings for the jury's imposition of the death sentence upon Mr. Fitzgerald by purportedly showing his blood chilling lack of remorse, but also provided a substantive basis upon which he could be convicted of a capital offense. <sup>9/</sup>

The Smith court viewed the justification for the use of a surprise witness and found that "the price of avoiding surprise was, at most, the insignificant cost of more regular and formal procedures." Id. at 700. The court observed:

[T]he gains from informality and relaxed procedures cannot possibly outweigh the risk that the state may execute a person who would not have been sentenced to death if the jury had had 'full and accurate sentencing information'--'an indispensable prerequisite to a reasonable determination of whether defendant shall live or die.' Gregg v. Georgia, 428 U.S. 153, 190 (1976).

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<sup>9/</sup> Moreover, it is worth noting that in the instant case the Commonwealth was so successful in shielding the inmate's testimony that it came as an absolute surprise: in Smith the surprise testimony came from a psychiatrist who the defense attorneys knew had examined their client in connection with the case. 602 F.2d at 697.

Applying the rationale of Gardner and Smith to the instant case, it is clear that there was no substantial justification for the intentional use of the surprise witness while there were compelling and unmistakable reasons -- if the criminal justice system is truly concerned with the interest in reliability -- for not using surprise tactics. If this Court's admonition in Williams v. Florida, 399 U.S. 78, 82 (1970), that a criminal trial is not "a poker game in which players enjoy an absolute right always to conceal their cards until played," is to have any meaning, then surely the deliberate concealment until trial of devastating testimony by a jailhouse snitch to bolster an otherwise insufficient capital murder charge cannot be condoned.

III. THIS COURT SHOULD GRANT CERTIORARI TO REVIEW WHETHER THE TRIAL COURT HAD AN AFFIRMATIVE DUTY TO INQUIRE FURTHER OF DEFENSE COUNSEL WHEN IT HAD ACTUAL KNOWLEDGE OF A POTENTIAL CONFLICT OF INTEREST ON THE PART OF THAT COUNSEL.

Petitioner was denied due process of law and his Sixth Amendment right to counsel free from conflict of interest when his trial judge with actual knowledge of a possible disqualifying conflict of interest, failed to inquire further to determine whether an actual conflict of interest existed. Wood v. Georgia, 450 U.S. 261, 272 (1981). The conflict arose in petitioner's case because his lead trial counsel's wife, before and during the prosecution, was an administrator in the Office of the Commonwealth Attorney, petitioner's prosecutor. App. at 29a-30a. The attorneys for both the Commonwealth and for petitioner were aware of this potential conflict throughout the prosecution. Most significantly, the trial court knew of this conflict, yet did nothing other than informing petitioner of that fact, for the first time, shortly before trial.

In Wood, this Court held that where the trial judge knew that the petitioners charged with distributing obscene

literature, were represented by their employer's attorney and where the record indicated that the lawyers' strategy was seemingly more for the benefit of the employer than petitioner's, the court was under a duty to recognize the possibility of a disqualifying conflict and inquire further. Wood, 450 U.S. at 273. In the instant case the trial judge failed to take any action prior to or during the trial to resolve the apparent conflict of interest other than merely inquiring of petitioner whether he was satisfied with counsel. The trial court did not inquire of defense counsel, the Commonwealth, petitioner or anyone else whether the conflict could result in a less vigorous defense. July 9, 1981 Motions Hearing, Tr. 23-24, App. 29a-30a.

It is generally recognized that an actual conflict of interest exists when a defense attorney places himself in a situation "inherently conducive to divided loyalties." Castillo v. Estelle, 504 F.2d 1243, 1245 (5th Cir. 1974). Moreover, certain situations involving a conflict of interest are so susceptible to bias as to demand a presumption that bias exists:

[I]n certain situations a hearing may be inadequate for uncovering a juror's biases, leaving serious question whether the trial court had subjected the defendant to manifestly unjust procedures . . . [T]here are some extreme situations that would justify a finding of implied bias. Some examples might include a revelation that the juror is an actual employee of the prosecuting agency [or] that the juror is a close relative of one of the participants in the trial[ ].

Smith v. Phillips, \_\_\_ U.S. \_\_\_,  
102 S.Ct. 940, 948 (1982)  
(O'Connor, J., concurring).

See also Holloway v. Arkansas, 435 U.S. 475, 485, 486 (1978) (reversing conviction where trial court failed, despite defense request, to inquire into conflict of interest).

Various state bar association ethics committee opinions have dealt with other situations similar to this case and have found it per se improper for one spouse to seek to represent a defendant prosecuted by the other spouse or a member of the staff of the public office which employs the spouse. Spouses and Conflict of Interest, 52 Den. L.J. 735, 748 (1975). These decisions were based on the "realities of the marital relationship" and the inherent possibility that the domestic and professional responsibilities of defense counsel and prosecutor might be on a collision course when they represent conflicting interests. See, Arizona Ethics Committee Opinion No. 73-6 (1973), Illinois State Bar Association Professional Ethic Opinion No. 311 (1968).

Moreover, in a civil matter the Virginia Bar Association Legal Ethics Committee stated that it would be unethical to allow a husband and wife to represent opposite sides of a divorce proceeding. 52 Den. L.J. 735, 769 (1975) (Appendix B). The opinion stated in relevant part:

Every client has the right to expect his lawyer's totally independent judgment and undivided loyalty. (EC 5-1). Every lawyer should zealously guard against any personal interest or involvement which might impair in any way his total, unrestrained dedication to his client's cause. (EC 5-2). And every client must feel free to discuss whatever he wishes with his lawyer. There should be no question of his lawyer's integrity in keeping these confidences inviolate, and the client should feel no inhibition whatever in making such revelations to his lawyer. (EC 4-1). To allow a husband and wife to advocate opposing positions in the same controversy, in the opinion of our Committee, tends to compromise these well-established principles of professional ethics.

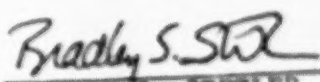
The undivided loyalty required of petitioner's defense attorney must be questioned where his wife's livelihood or other aspects of her employment might be affected or jeopardized as a result of his actions. In view of the acute requirement for fairness in capital cases, and the failure of the trial court, despite actual knowledge of the conflict, to conduct the inquiry mandated by Wood, petitioner urges that his conviction be reviewed and reversed by this Court.

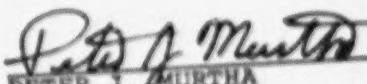
CONCLUSION

For the foregoing reasons, petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Virginia in Fitzgerald v. Commonwealth, \_\_\_ Va. \_\_\_, 292 S.E.2d 796 (1982).

Respectfully submitted,

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